IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1482

GEISHA HOUSE, INC., *Petitioner*

v.

MAURICE J. CULLINANE, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Petitioner Geisha House, Inc. prays that a writ of certiorari issue to review the judgment of the District of Columbia Court of Appeals entered in the above-entitled case on March 22, 1976.

CITATION TO OPINION BELOW

The opinion of the District of Columbia Court of Appeals is reproduced in the appendix to this petition. There also appears the decision by Chief Judge Harold Greene of the Superior Court of the District of Columbia, overturned by the appellate court.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

QUESTIONS PRESENTED

1. Should the lower court's serious misapplication of the *Hicks* "doctrine" whereby it decreed certain constitutional issues foreclosed by the Supreme Court which this latter tribunal has never actually addressed, be corrected and its recurrence in other forums discouraged by a more exact delineation of the elasticity of the doctrine?

2. Should the doctrine be clarified or modified in any respect?

3. Is one who earns his living as a massagist plying one of the ordinary trades or occupations entitled to constitutional protection as a fundamental freedom? If so, what compelling state interest can justify a revenue measure that makes it a crime for a massagist to work on customers of the opposite gender in licensed massage parlors but leaves him free to do so anyplace else in the city?

STATEMENT OF THE CASE

Geisha House, Inc., is a District of Columbia corporation whose principal object is the operation of a massage parlor business. Having been issued articles of incorporation (to administer "bisexual massages"), a massage parlor license and an occupancy permit, it opened for business on June 27, 1974, at 1819 L Street, N. W. Not long thereafter the local police made successive arrests of massagists under contract to appellee, effectively shutting down its business. The sole basis

for the arrests and related manifestations of police interest in the business was D. C. Code § 47-2311. This is part of a 1932 revenue bill enacted by the Congress for the District which, in relevant part, purports to make it unlawful

> "... for any female to give or administer massage treatment or any bath to any person of the male sex, or for any person of the male sex to give or administer massage treatment or any bath to any person of the female sex, in any establishment licensed under this section."[1]

Finding its business thus imperiled, the corporation filed a civil action seeking to enjoin respondents from further enforcement of the allegedly unconstitutional statute. The case was heard by Superior Court Chief Judge Harold Greene before whom petitioner submitted evidence by affidavit, testimony and stipulation. Respondents submitted no evidence at either of the two

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[1] This language differs materially from the more recently enacted "massage parlor" ordinances presented to this Court for review in *Smith* v. *Keator*, 419 U.S. 1043 (1974), *Rubenstein* v. *Cherry Hill*, 417 U.S. 963 (1974), and *Kisley* v. *City of Falls Church*, 409 U.S. 907 (1972), *dismissing for want of a substantial federal question*, respectively, 285 N.C. 530, 206 S.E. 2d 203 (1974), No. 10, 027 (N.J.Sup.Ct., January 29, 1974), and 212 Va. 693, 187 S.E 2d 168 (1972) and discussed, *infra*. The 1932 District of Columbia formulation outlaws cross-sexual massage only within licensed massage parlors, leaving the practice lawful everywhere else in the city. The state ordinances involved in the three cases above were comprehensive attempts to regulate the practice city-wide by enumerated prohibitions and exemptions which, accepting the legitimacy of their objectives, were not unrational. In other words, they were cast in the logical form "all cross-sexual massage is prohibited except where specifically exempted herein" whereas the District of Columbia statute means that "cross sexual massage is permissible everywhere in the city except within licensed parlors."

hearings held by the Court. They acknowledged through counsel that they could discern no legislative purpose underlying the statute in question other than the raising of revenue. Nor did they offer evidence, or claim to be able to show, that any criminal activities (other than the infraction of § 47-2311 itself) had occurred on the Geisha business premises or would be likely to if the injunction issued.

On July 31, 1974 Judge Greene granted a preliminary injunction and on September 25, 1974, after a second hearing, he made it permanent, accompanying the order with a 34-page opinion. He declared the statute unconstitutional on multiple grounds. Among other things, he held that the practice of massage, a common trade or occupation, enjoyed constitutional protection as a fundamental freedom. He thus held that there was no compelling state interest making it necessary to outlaw the practice on customers of opposite gender within licensed massage parlors but nowhere else. His was also the first decision to hold that under the Court Reform and Reorganization Act of 1970 the Superior Court possesses jurisdiction to enjoin the enforcement of a Congressionally-enacted statute applicable only within the District of Columbia.

After the case had been briefed, following an appeal by respondents, this Court's decision in *Hicks* v. *Miranda*, 422 U.S. 332 (1975), was published. There the Court decided an appeal from a Three-Judge Court involving a constitutional challenge of a California obscenity statute. It was the *same* statute whose invulnerability to the same constitutional challenge had shortly before been affirmed by the state supreme court, after which the Supreme Court had dismissed the

appeal therefrom for want of a substantial federal question. Writing for the majority, Justice White observed that

> "The District Court should have followed the Second Circuit's advice . . . that 'unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial it remains so except when doctrinal developments indicate otherwise." 422 U.S. at 344

This language was later interpreted by the Third and Fourth Circuits as binding upon them in cases involving cross-sexual massage ordinances, *Colorado Springs Amusement, Ltd.* v. *Rizzo*, 524 F. 2d 571 (3rd Cir. 1975); *Hogge* v. *Lawson*, 526 F. 2d 833 (4th Cir. 1975). They reviewed the jurisdictional statements in three appeals from state courts involving cross- sexual ordinances which the Supreme Court had earlier dismissed for want of a substantial federal question, *Smith* v. *Keator*, 419 U. S. 1043 (1974); *Rubenstein* v. *Cherry Hill*, 417 U. S. 963 (1974); and *Kisley* v. *City of Falls Church*, 409 U. S. (1972), concluding that the dismissals had, by implication, foreclosed certain of the constitutional contentions, although none had ever been expressly adjudicated or the subject of an opinion by the Supreme Court. On this approach they felt they were barred from considering the analytical merits of the constitutional claims, notwithstanding the existence of substantial and unimpeached decisional authority, both state and federal, in support of them.

The District of Columbia Court of Appeals followed an identical course in the instant case, except that it did not stop to evaluate the precise facts and conten-

tions at bar and compare them carefully with those purportedly decided in the three Supreme Court dismissals.[2] It reversed Judge Greene in an opinion dated March 22, 1976. Petitioner's petition for rehearing *en banc* was denied without comment on April 9, 1976. From these decisions petitioner seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

I.

Former Supreme Court Justice Tom Clark, separately concurring in *Hogge, supra,* forecast in no uncertain terms the serious dangers of what has come to be called the *Hicks* "doctrine". He said,

> "The Supreme Court's statements in *Hicks* v. *Miranda,* 422 U. S. 332 . . . to the effect that such dismissals are decisions 'on the merits' seem to me to fly in the face of the long-established practice of the Court at least during the eighteen Terms in which I sat. During that time, appeals from state court decisions received treatment similar to that accorded petitions for certiorari and were given about the same precedential weight. *An unquestioning application of the Hicks rule can lead to nothing but mischief* and place an unnecessary restraining hand on the progress of federal constitutional adjudication.
>
> "Here, for example, the other members of the panel thought, as did I, that there *was* a substantial federal question presented by this case. The question deserves elaboration. That is foreclosed by *Hicks'* holding that we must accept the *Kisley*

[2] Nor did it address the issue of the Superior Court's jurisdiction, evidently taking the view that since it had not been contested there was no need to decide it. See Appendix, p. 29a.

> dismissal as binding. Yet I cannot believe that the Court in 1972 gave such serious consideration to the merits of that case as to justify the precedential value now assigned to it." (First emphasis supplied) 526 F. 2d at 836

The case at bar acutely illustrates the mischievous potential of the doctrine. By an application of it, "unquestioning" at best, the District of Columbia Court of Appeals elided at least some issues of major constitutional dimension, upset significant property and professional values, and did so in the name of the Supreme Court when this tribunal has not hitherto had an opportunity to consider a statute and factual context exactly like those in question here. The elasticity of the *Hicks* doctrine is plainly a major "problem of general federal law of nationwide application," *Pernell* v. *Southall Realty,* 416 U. S. 363, 366 (1974), hence eminently suitable for review by this Court even though arising from the District of Columbia. And because this appears to be the first case in which the problem is so clearly focused, the Court should grant this petition to insure that the mischief does not spread.

Assuming *arguendo* its soundness and applicability to the District of Columbia court, the *Hicks* "doctrine" was nonetheless radically misapplied by that body. If a court deems itself bound by summary dismissals, said this Court in *Hicks* "its initial task . . . [is] to ascertain what issues . . . [were] properly presented in [the Supreme Court dismissals] and declared by [the Supreme Court] to be without substance." *Hicks* v. *Miranda,* 422 U. S. 332, n.14. There are at least three important respects in which the statute at bar stands on a different constitutional footing than any of the ordinances presented on appeal to the Supreme Court,

all of which were unaccountably ignored by the District of Columbia Court of Appeals.

First, the ordinances in *Kisley, Smith* and *Rubenstein* were of recent vintage, expressly enacted for the purpose of protecting the public morals, in the wake of a proliferation of massage parlors in which there was a demonstrable threat of collateral law violations. The 1932 enactment here in question was, by its terms, only a revenue measure and there is concededly no evidence of any other legislative purpose. What the panel actually did was to treat the statute *as if* it has been a legislative response to the mischief presumably threatened by the sizeable number of massage parlors which opened in the city after Judge Greene's decision, when in fact this was not the case.

Second, quite unlike the earlier cases before the Supreme Court, there was absolutely no evidence in this case, or before Congress in 1932, that cross-sexual massage in licensed parlors would lead to the commission of collateral sex offenses such as prostitution. There is no prohibition under local law of the sort of massage provided by petitioner, including massage of a customer's genitalia, thus there would be no incentive for it to break any sex laws even if it were disposed to, which it most decidedly is not and never has been. Not only did the panel *assume* a nonexistent legislative purpose, but it likewise *assumed* that there was a factual probability of collateral sex law violations when the record was bereft of any evidence of this and, indeed, affirmatively showed that petitioner had broken no such laws and was not likely to do so. This "dual fiction" approach was intrinsically wrong and blinked the cardinal fact that in none of the Supreme Court dismissals

could the Supreme Court be said to have decided that the questions here are unsubstantial.

Third, the statute here forbids cross-sexual massage *only* within parlors licensed under the statute, leaving everyone else in the city free to administer such massages. In this also it differs from the ordinances involved in the Supreme Court dismissals. Such a distinction, like those above, obviously has a strong bearing on the rationality of the means adopted by the legislature to achieve its putative objective. It means, again, that the Supreme Court has never decided, even by implication, that the constitutional issues now at bar are unsubstantial.

The lower court's approach to *Hicks* was that if the "issues here were for all practical purposes previously presented to the Supreme Court . . . this would leave little for us in deciding this case." (Appendix, p. 30a) But in *Hicks* this Court did not, we think, authorize inferior tribunals, either for practical or legal purposes, to disregard such constitutionally resonant points as those just enumerated above. The effect of the lower court's very loose application of the doctrine was to sweep these important issues aside, nominally adjudicated on the authority of the Supreme Court, but never actually adjudicated by any court. Unless this case is reviewed, and the proper implementation of *Hicks* further illuminated, this unfortunate "for-all-practical-purposes" example will be allowed to stand for *all* courts, state and federal, to follow. Many will be more conscientious, some no doubt will not; but the temptation is one from which all, however resolute, should be delivered. We say this because the gravity of the subtle evil in this approach is hard to overstate,

especially if it becomes a trend. The instant perversion of *Hicks* is evil because it is an ellipsis; a mode of "deciding" issues—perhaps especially "controversial" ones—without ever confronting them. It would be difficult to imagine a judicial practice more subversive of the rule of law itself; yet as the practice becomes systemic the myriad injustices generated and buried in individual cases will readily become too numerous for this Court to police on a case-by-case basis. For this reason, without more, this petition should be granted.

II.

As an obvious correlative of the above, this case also presents an opportunity for this Court to reconsider or modify the *Hicks* teaching, should it be so disposed.

Although the teaching has been recently reaffirmed, *McCarthy* v. *Philadelphia Civil Service Commission*, — U. S. —, — U. S. Law Wk. — (No. 75-783, decided March 22, 1976), it has never been rationalized in any plenary fashion. Conceptually, of course, it follows that because appeals are matters of right an order of dismissal or affirmance is adjudicatory in character. But it is equally obvious that this putative adjudication-by-order is a poor and highly imprecise method for the enunciation of law. In the absence of an opinion there is no way by which a lower court can ascertain upon exactly what rules of law or in exactly what factual context the Court was acting. Compounding the uncertainty is the fact that summary disposition of a case by the Supreme Court does not prevent it from later holding a full hearing or deciding the other way. E.g., Compare *Board of Education* v. *Barnette*, 319

U. S. 624 (1943) with *Leoles* v. *Landers*, 302 U. S. 656 (1937) and *Dunn* v. *Blumstein*, 405 U. S. 330 (1972) with *Drueding* v. *Desbin*, 380 U. S. 125 (1965).

For these and other reasons most federal circuits have traditionally accorded summary decision little if any precedential weight. See *Note*, 43 Fordham L. Rev. 476, 478 (1974). The Ninth Circuit has effectively rejected it, *Dillenburg* v. *Kramer*, 469 F. 2d 1222, 1225 (1972) (summary affirmance of case within Court's "obligatory appellate jurisdiction has very little precedential significance") and the Sixth has done so in terms, *Jordan* v. *Gilligan*, 500 F. 2d 701, 707-708 (6th Cir. 1974), as have some state courts, e.g. *Serrano* v. *Priest*, 487 P. 2d 1241, 1264 and n. 35 (Cal. Sup. Ct. 1971). A prestigious study group recently concluded that the Court's summary disposition of cases on its appellate docket "is not a satisfactory equivalent for the judgment on the merits it is supposed to be." *Report of the Study Group on the Caseload of the Supreme Court 26* (1972); see also, *United States ex rel. Epton* v. *Nenna*, 318 F. Supp. 899, 906, n. 8 (S. D. N. Y. 1970); Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U Chi. L. Rev. 1, 74, n. 365 ("It has often been observed that the dismissal of an appeal, technically an adjudication on the merits, is in practice often the substantial equivalent of a denial of certiorari."); Frankfurter & Landis, *The Business of the Supreme Court at October Term 1929*, 44 Harv. L. Rev. 1, 14 (1930)[3]

[3] Largely because of the general dissatisfaction with this summary disposition of appeals the Study Group has recommended that the Court's appellate jurisdiction be abolished, leaving all review discretionary in character. See *Study Group*, *supra*, 596-605, 611-612. Mr. Justice Brennan has warmly endorsed this recom-

Moreover, in *Edelman* v. *Jordan*, 415 U. S. 651 (1974), the Court held that the Eleventh Amendment bars the retroactive payment of benefits to one who has successfully challenged the denial of grants under a state aid program supported by federal funds. This was squarely contrary to three earlier decisions in which the Court had summarily affirmed such retroactive payments. Writing for the Court, Justice Rhenquist offered one of the rare pre-*Hicks* comments by a Justice on the vexatious question of the precedential value of summary dispositions. He noted that "summary affirmances . . . obviously . . . are not of the same precedential value as would be an opinion of this Court treating the question on the merits" 415 U. S. at 671.

Given the problematical character of the doctrine as well as the danger it portends, any modification or clarification the Court might wish to provide at this time would be of singular importance.

III

The constitutional issues surviving *Kisley, Rubenstein* and *Smith* are of considerable practical and conceptual importance. They can be variously formulated but revolve about the "dual fiction" method of adjudication mentioned above, the legitimacy of criminal phophylaxis as an imputed legislative objective on the peculiar factual circumstances of this case, and the matter of invidious discrimination. The last question

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mendation, noting that since the "policy considerations that gave rise to the distinction between review by appeal and review by writ of certiorari have long since lost their force, I support most enthusiastically the proposal to abandon the appellate jurisdiction. . . ." Brennan, *The National Court of Appeals: Another Dissent*, 40 U. Chi. L. Rev. 473, 474 (1973).

can be more familiarly stated thus: Assuming that a massagist's right to ply her trade is a "fundamental freedom", *Truax* v. *Raich*, 239 U. S. 33, 36 (1915); see also, *Terrace* v. *Thompson*, 263 U. S. 197 (1923), is there a compelling state interest for the accomplishment of which it is "necessary", *Shapiro* v. *Thompson*, 394 U. S. 618 (1969); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960), that work on male customers in a licensed massage parlor be made a crime when it is not one anywhere else? This precise question has never been decided by this Court. In view of the widespread proliferation of massage parlors and the presumed public interest in them throughout the country, a definitive resolution of the issue would be quite timely.

CONCLUSION

For the foregoing reasons the petition should be granted.

Respectfully submitted,

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April 14, 1976

APPENDIX

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

GEISHA HOUSE, INC.

v.

JERRY V. WILSON and ROBERT L. DOLLARD

C.A. 6044-74

Opinion

This case presents two legal issues heretofore unresolved in the District of Columbia. The first, which is of broad significance, involves the power of a judge of the Superior Court to enjoin the enforcement of an Act of Congress on grounds of unconstitutionality, notwithstanding 28 U.S.C. § 2282. The second issue, which is more limited in nature, concerns the constitutionality of D.C. Code § 47-2311 which regulates certain aspects of the operation of massage parlors.

I

The facts are essentially undisputed and were largely stipulated between the parties.

The plaintiff is a corporation recently formed and licensed to do business as a massage establishment in the District of Columbia. Defendant Jerry V. Wilson is the Chief of the Metropolitan Police Department of the District of Columbia and defendant Robert L. Dollard is an inspector of the Metropolitan Police Department, in charge of the Morals Division.

On March 1, 1974, Plaintiff was issued a certificate of incorporation by the District of Columbia Recorder of Deeds. Its articles of incorporation assert as one of its corporate purposes the operation of a massage establishment. Plaintiff opened for business on June 17, 1974, at 1819 L Street, N.W.

On June 26, 1974, two women employees were arrested inside the premises occupied by Geisha House, pursuant to D.C. Code § 47-2311 which provides in pertinent part that "[i]t shall be unlawful for any female to give or administer massage treatment or any bath to any person of the male sex, or for any person of the male sex to give or administer massage treatment or any bath to any person of the female sex, in any establishment licensed under this section. Any person violating the provisions of this section shall, upon conviction, be punished as hereinafter provided in this chapter."[1] The arrests were made as plaintiff's employees began to give a massage to undercover officers of the Metropolitan Police Department. These arrests had no basis other than alleged violations of section 2311. No immoral activity, such as prostitution or solicitation for the purpose of prostitution, is claimed by the District to have occurred on the premises of Geisha House.

Because of continuing arrests,[2] plaintiff was forced to shut down its business on July 3, 1974, at a substantial financial loss. On July 11, 1974, it moved this Court for a temporary restraining order to restrain defendants from enforcing or implementing section 2311. That motion was denied, but on July 31, 1974, the Court granted a motion for preliminary injunction which halted the enforcement of the statute on plaintiff's premises pending a decision on the merits. On September 16, 1974, a hearing was held on plaintiff's request for a permanent injunction. In the meantime, the preliminary injunction has remained in effect.

II

At the outset the Court is met with the question of its power to enjoin the enforcement of an Act of Congress of

[1] The punishment provided for a violation of the statute is imprisonment for not more than 90 days or a fine of not more than $300. D.C. Code § 47-2347.

[2] On July 3, 1974, another female employee was arrested at the Geisha House and she, too, was charged with a violation of D.C. Code § 47-2311.

local application. Although the parties have stipulated to the existence of such power, the Court is obligated to examine the matter independently since the issue goes to its jurisdiction over the subject matter.

28 U.S.C. § 2282 provides that

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

It might be argued that because of this statutory provision the Court lacks power to issue such an injunction, and indeed, Judge Oliver Gasch, sitting as a Superior Court Judge pursuant to 28 U.S.C. § 292(c) and D.C. Code § 11-908(c), recently held in C.A. 7600-73—*Washington* v. *Ellison* that a three-member panel of federal judges is required to enjoin enforcement of a congressional enactment even if it affects only the District of Columbia. After full consideration, I have come to a contrary conclusion, for the following reasons.

First. The statute itself applies in terms only to district courts and their judges.[3] The Superior Court of the District of Columbia is not a district court, and its judges are not district court judges. The Superior Court was created under the power conferred upon Congress by Article I of

[3] It has been held that, at least for some purposes, the term district courts as used in Title 28 of the U.S. Code means only those courts which are created under Article III of the Constitution and which are constituted by Chapter 5 of Title 28. *Mookini* v. *United States*, 303 U.S. 201; *Wells* v. *United States*, 214 F.2d 380 (1954); *International Longshoremen's Union* v. *Wirtz*, 170 F.2d 183 (9th Cir. 1948); *Reese* v. *Fultz*, 96 F. Supp. 449 (D. Alaska 1951).

the Constitution (see *infra*), and the language of section 2282 does not explicitly apply to it.

Second. The U.S. Court of Appeals for the First Circuit has held that section 2282 does not preclude a single judge in Puerto Rico from enjoining an act of its territorial legislature. *Puerto Rico Light and Power Co.*, v. *Colom*, 106 F. 2d 345 (1st Cir. 1939). Although at the time of the court's ruling the Puerto Rico legislature derived its powers directly from Congress, and although its acts were subject to congressional annulment and a limited Presidential veto, the exercise of the injunctive power by a single judge was viewed by the court in *Colom* not to be inconsistent with 28 U.S.C. § 2282. According to the Court of Appeals, section 2282 was meant to limit the jurisdiction of Article III courts acting with respect to general federal legislation, not that of courts, which, like the District Court for the District of Puerto Rico, are created pursuant to special congressional powers and deal with more limited subject matter. The courts in the District of Columbia were, of course, likewise created under congressional powers unrelated to Article III. Thus, the analysis of the court in *Colom* is directly applicable to the present case.[4]

[4] This Court does not read the *Colom* decision as broadly holding that any non-Article III court would have the power to enjoin enforcement of any act of Congress. See also *Stainback* v. *Mo Hock*, 336 U.S. 368 (1949); *Penagaricano* v. *Allen Corp.*, 267 F.2d 550 (7th Cir. 1959); *Mora* v. *Mejias*, 206 F.2d 337 (1st Cir. 1953); *ILWU* v. *Akerman*, 82 F. Supp. 65 (D. Hawaii 1949). Any such construction would, of course, create serious problems under the Supremacy Clause. However, just as in *Colom* there were no such problems because the territorial court and the legislature were both creations of the Congress, so here, a recognition that jurisdiction obtains in this Court (which is likewise a creature of the Congress) to enjoin an act of Congress of local applicability, would involve no Supremacy Clause difficulties. For that reason this Court does not share the concern expressed in the *Washington* case, *supra*, that unless section 2282 were to be applied rigidly, state courts might enjoin federal statutory schemes. Nothing herein need or should be construed to extend authority to invalidate congressional enactments to courts created by a State.

Third. The Congress in recent years enacted two statutes which bear significantly upon the jurisdictional question. The first of these is the District of Columbia Court Reform and Criminal Procedural Act of 1970, Public Law 91-358, 91st Congress (July 29, 1970). The purpose of that law, as the Supreme Court recognized in *Palmore* v. *United States* 411 U.S. 389 (1973), was

> to relieve the regular Article III courts . . . from the smothering responsibility for the great mass of litigation, civil and criminal, that inevitably characterizes the court system in a major city and to confine the work of those courts to that which they were designed to, namely, to try cases arising under the constitution and the nationally applicable laws of Congress. The other part of the remedy, equally essential, was to establish an entirely new court system with functions essentially similar to those of the local courts found in the 50 States of the Union with *responsibility for trying and deciding those distinctively local controversies that arise under local law, including local criminal laws having little, if any impact beyond the local jurisdiction* (411 U.S. at 408-409) (emphasis added).

The Court emphasized that the local tribunals were created pursuant to the plenary Article I power of Congress which it regarded as equivalent to the power of a state government in all cases where legislation is possible (411 U.S. at 407). Congress, said the Court, has power to exercise within the District "all legislative power that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates . . . ." (411 U.S. at 397).

I believe it is fair to conclude from these statements in *Palmore* that the Supreme Court there viewed the judicial system of the District of Columbia as being essentially like the judicial system of a State, and that it regarded the Con-

gress, when legislating for the District of Columbia, as being akin to the legislature of a State.

This, of course, does not mean that the analogy between the District and a State is precise and apt for all purposes.[5] The Supreme Court made it clear in *Pernell* v. *Southall Realty*, 94 S.Ct. 1723, 1726, note 4 (1974) that it did "not intend to imply that the District of Columbia Superior Court and Court of Appeals must be treated as state courts for all purposes," referring *inter alia* specifically to issues surrounding *Younger* v. *Harris*, 401 U.S. 37 (1971) and *Sullivan* v. *Murphy*, 156 U.S. App. D.C. 28, 478 F.2d 938, 962 (1973) as presenting unresolved questions concerning the relationship between the District of Columbia local courts and the Federal courts in this circuit.

Thus, a situation-by-situation analysis is appropriate. For present purposes, it is interesting to note that the U.S. Court of Appeals for the District of Columbia Circuit held in *Keyes* v. *Madsen*, 86 U.S. App. D.C. 24, 179 F.2d 40 (1949) that the requirement of certification of cases to the Attorney General under 28 U.S.C. § 2403[6] does not extend to statutes which are restricted to the District of Columbia and matters of mere local interest (179 F.2d at 43). This decision, which holds inapplicable to enactments limited to the District a procedure otherwise required in litigation which involves the constitutionality of congressionally-enacted statutes, is in my view directly relevant to the question of whether the three-judge court requirement of section 2283 ought not to be similarly restricted to national legislation.

[5] As Mr. Justice Brennan said in *District of Columbia v. Carter*, 409 U.S. 418 (1973), the exceptional control of Congress over local government has rendered the District of Columbia "an exceptional community" and truly "sui generis" in our governmental structure. This unusual position of the District in our federal system has been apparent since the framers originally provided for its government in the Constitution. Under Article I, § 8 cl. 17 Congress was given power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. See generally, *Capital Traction Co.* v. *Hof*, 174 U.S. 1 (1899).

[6] Such certification is required whenever the constitutionality of an act affecting the public interest is involved.

The *Palmore* decision, as well as the *Keyes* precedent, reinforce the conclusion that, for purposes of the present jurisdictional issue, legislation enacted by the Congress for the District should be viewed for what it is, that is, local legislation, the constitutionality of which may be tested in the District of Columbia courts according to District of Columbia procedures.

The Home Rule legislation enacted by the Congress in 1973 provides a further and strong indication of the congressional intent to divorce many aspects of District of Columbia governmental authority from the arena of national governmental bodies. Title I of the Act (P.L. 93-198, 87 stat. 775, Dec. 24, 1973, p. 4) states that the purposes of the law are to

> . . . grant the inhabitants of the District of Columbia powers of local self-government; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

It would in my judgment be anomalous and illogical to conclude that, notwithstanding developments which were clearly designed to establish a District of Columbia court system with full powers with respect to local laws, section 2283 has to be read, contrary to its explicit language, as reserving to the federal courts the sole power to pass upon the constitutionality of legislation enacted by the Congress in its capacity as the legislature for the District of Columbia.

Fourth. The purpose underlying the three-judge court act was to limit single federal court judges from freely

issuing injunctions which might interfere with broad state or federal regulatory schemes. Section 2281 was designed to relieve the strain in federal-state relations which resulted from a flood of federal court litigation that followed in the wake of the Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). See 42 Cong. Rec. 4846-59 (1908); 45 Cong. Rec. 7253-57 (1910); Ammerman, "Three Judge Courts; See How They Run," 52 F.R.D. 293, 295-6 (1971); Hart and Wechsler, *The Federal Courts and the Federal System*, 848-55 (1953). Section 2282 was a product of the congressional concern over the abandon with which single federal judges had invalidated national New Deal legislation. See "Injunctions in Cases Involving Acts of Congress," Sen. Doc. Nos. 25-33, 37-39, 41-44, 75th Cong. 1st Sess. (1937); 81 Cong. Rec. 235-6, 2142-3 (1937); S. Rep. No. 711, 75th Cong. 1st Sess. 3 (1937).

The provisions for three-judge courts, followed by direct and speedy Supreme Court review, were thus deemed necessary to safeguard broad and vital regulatory laws from the jeopardy of injunctions issued by single judges. Outside of that area, these provisions have been narrowly construed. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154 (1963); *Phillips* v. *United States*, 312 U.S. 246 (1941); *Ex parte Collins*, 277 U.S. 565 (1928).

None of the purposes which gave rise to the enactment of the three-judge court statutes would be served by construing these acts as applicable to litigation involving the constitutionality of laws limited solely to the internal affairs of the District of Columbia. Certainly, no national interest would be jeopardized if the constitutional validity of a District law dealing with the regulation of massage parlors[7] were litigated in the Superior Court, with a pos-

[7] Although in the present instance we are concerned with the applicability of § 2282 to what in form is a statute, it should be noted that its companion, section 2281, has been held not to apply to municipal ordinances but only to state statutes of general ap-

sible appeal to the D.C. Court of Appeals, and the ever-available, ultimate remedy of further review in the U.S. Supreme Court.[8]

This Court accordingly holds that it has jurisdiction to declare Acts of Congress of purely local application unconstitutional and the power to enjoin their enforcement.

III

Before proceeding to the merits of the constitutional claims, the Court must consider several other preliminary issues.

plicability. *Ex parte Collins*, *supra*. As Mr. Justice Brandeis there wrote, "section [2281] was intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public." 277 U.S. at 267. In the present case, this Court is being called upon to enjoin the enforcement of a section of the D.C. Code which involves the licensing of massage parlors, a regulatory statute which would more typically take the form of an ordinance in the normal state statutory scheme. That the jurisdiction of a three-judge federal court should extend to such a matter in view of the reluctance of the courts to consider this type of issue,, simply because the statute in question was enacted by Congress, would be contrary to the limited effect given section 2281 by the courts and the policy of federal noninterference in matters of purely local concern.

[8] In addition to a judicial tendency to strictly construe the statutory requirements of the three-judge Court Act, noted above, there have been recent attempts in Congress to eliminate the requirement of the three-judge court in cases seeking to enjoin the enforcement of state or federal laws. See S. Rep. No. 93-206, 93rd Cong., 1st Sess. (1973); H.R. 3805, 92nd Cong., 1st Sess. (1971); Report of the Proceedings of the Judicial Conference of the United States, Oct. 29-30, p. 78 (1970); Ammerman, *supra* at 297. This distaste for the three-judge concept is based in considerable part on the burdensome aspects of that scheme and its tendency to obstruct the federal judicial dockets. A determination that the constitutional validity of purely local laws is the business of the local courts is thus consistent with current judicial purposes and policy.

The District of Columbia has questioned whether Geisha House, Inc., has standing to bring the instant action, in view of the fact that the massage parlor statute does not, in terms, apply to this plaintiff. The explicit prohibition of section 2311 reaches only "any female" who administers a massage, not the establishment in which the massage is applied. Nevertheless, it is clear that Geisha House has standing, on at least three bases.

First, if a prohibited massage is performed by one of plaintiff's employees on plaintiff's premises, plaintiff may be prosecuted as an aider and abettor (*Berman* v. *District of Columbia*, 132 A.2d 147 (D.C. Mun. App. 1957)). Second, if one of plaintiff's masseuses against whom criminal prosecutions are pending is convicted, the District of Columbia would have the duty, under section 2311 "to revoke the license of the owner or manager of the establishment . . . ." There is no reason why plaintiff should be required to await and undergo a criminal prosecution or license revocation as the sole means of seeking relief. *Doe* v. *Bolton*, 410 U.S. 179 (1973); *Crossen* v. *Breckenridge*, 446 F.2d 833 (6th Cir. 1971); *Poe* v. *Menghini*, 339 F. Supp. 986 (D. Kan. 1972). And third, the injury to plaintiff by virtue of the enforcement of this statute would directly prevent the employment of those persons whom plaintiff would ordinarily hire and would thus prevent it from practicing its business in a normal manner. That kind of relationship has been held in similar circumstances to be sufficient to confer the requisite standing on the owner of a massage parlor. *Corey* v. *City of Dallas*, 352 F. Supp. 977 (N.D. Tex. 1972); *Valley Health Systems, Inc.* v. *City of Racine*, 369 F. Supp. 97 (E.D. Wis. 1973); see also, *Truax* v. *Raich*, 239 U.S. 33 (1915); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

The District further suggests that, inasmuch as a criminal prosecution has been instituted against at least one

of plaintiff's employees, the issues sought to be litigated here could and should be raised as matters of defense in the criminal prosecutions. Accordingly, it is contended, there is an adequate remedy at law, and equitable relief is inappropriate. But the short answer is that no criminal prosecution has been brought against this plaintiff, and it thus cannot litigate the constitutional issues elsewhere. Moreover, it is unclear whether these issues will ever be raised by the defendants in the criminal actions.[9]

Plaintiff likewise lacks a civil remedy short of the instant lawsuit. As indicated, *supra*, plaintiff stands in jeopardy of a criminal prosecution and conviction, and it is axiomatic that this kind of an injury cannot be cured by an action for damages. Neither the District nor its agents, Chief Jerry Wilson and Inspector Robert Dollard, would be liable in damages for their enforcement of a statute duly enacted by the Congress even if at the conclusion of a criminal prosecution it should ultimately turn out that the law is unconstitutional. See *Norton* v. *McShane*, 332 F.2d 855 (5th Cir. 1964); *Laughlin* v. *Garnett*, 78 U.S. App. D.C. 194, 138 F.2d 931 (1943); *J.S.K. Enterprises, Inc.* v. *City of Lacey*, 493 P.2d 1015 (Wash. 1972); *Joseph* v. *House*, 353 F. Supp. 367 (E.D. Va. 1973).

The Corporation Counsel also argues that under the policy of 28 U.S.C. § 2283 and the decision of the Supreme Court in *Younger* v. *Harris*, 401 U.S. 37 (1971), this Court, acting as a court of equity, is precluded from interfering with criminal prosecutions. *Douglas* v. *City of Jeannette*, 319 U.S. 157 (1943). But the *Younger* decision—assuming that it has application to the District of Columbia[10]—prohibits only an interference with pending criminal ac-

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[9] At least in the one prosecution presently pending (Crim. No. 48572-74—*District of Columbia* v. *Miller*), the issue of the constitutionality of the statute has not been raised.

[10] *Pernell* v. *Southall Realty*, *supra* at 1726.

tions, not with criminal prosecutions that may be brought in the future. *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Boraas* v. *Belle Terre*, 476 F.2d 806 (2d Cir. 1973); *Cole* v. *Graybeal*, 313 F. Supp. 48 (D. Va. 1970); *Baines* v. *City of Danville*, 337 F.2d 579, 595 (4th Cir. 1964).

IV

Statutes or ordinances prohibiting the administration of massage treatment to persons of the opposite sex have been tested by the courts in a number of states; and they were determined to be invalid in the vast majority of the cases. Such enactments were declared unconstitutional or their enforcement was enjoined by the U.S. Court of Appeals for the Fourth Circuit (*Joseph* v. *House*, 482 F.2d 575 (4th Cir. 1973), rejecting appeal, *Joseph* v. *House*, 353 F. Supp. 367 (E.D. Va. 1973)); the US District Court for the Northern District of Texas (*Corey* v. *City of Dallas*, 352 F. Supp. 977 (N.D. Tex. 1972)); the Court of Appeals for the State of Washington (*J.S.K Enterprises* v *City of Lacey*, 492 P.2d 600 (Wash. 1972)); the U.S. District Court for the Eastern District of Wisconsin (*Valley Health Systems* v. *City of Racine*, 369 F. Supp. 97 (E.D. Wis. 1973)); the Supreme Court of North Carolina (*Cheek* v. *City of Charlotte*, 160 S.E. 2d 18 (N.C. 1968)); the U.S. District Court for the Eastern District of Tennessee (*Cianciolo* v. *City of Knoxville*, Civil Action 8485 (E.D. Tenn. 1974)).

Some years ago, several courts upheld the constitutionality of such enactments, including the California District Court of Appeals (*Ex parte Maki*, 133 P.2d 64 (Cal. 1943)); the Court of Civil Appeals of Texas (*Patterson* v. *City of Dallas*, 355 S.W. 2d 838 (Tex. 1962)), and the Supreme Court of Virginia (*Kisley* v. *City of Falls Church*, 187 S.E. 2d 168 (Va. 1972, but these early holdings have since either been overturned or substantially impaired by

subsequent decisions.[11] There are currently but two cases in which the validity of massage parlor ordinances has been unequivocally upheld. *Smith* v. *Keator*, 203 S.E. 2d 411 (N.C. Ct. App. 1974); *Rubenstein* v. *Township of Cherry Hill*, Case No. M-236 (N.J. Sup. Ct. 1974).

Government has the authority to treat different classes of persons in different ways, in such areas as public health, safety, and morality. *Reed* v. *Reed*, 404 U.S. 71 (1971). However, this governmental power is circumscribed by the Equal Protection Clause,[12] and when a challenge based upon the classification is made under that Clause, a court is required to consider "the facts and circumstances behind the law, the interests which the State claims to be protecting and the interest of those who are disadvantaged by the classification" *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *accord*, *Kramer* v. *Union Free School District*, 395 U.S. 621, 626 (1969).

More specifically, depending upon the interest affected, a classification challenged as a denial of equal protection is evaluated by one of two standards. If the classification impinges upon what has come to be recognized as a fundamental right, or if the class it creates is one that is regarded as inherently suspect (such as race or national origin), then that classification is subjected to strict scrutiny, and the constitutionality of the legislative enactment

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[11] *Patterson* and a line of Texas cases were effectively overruled by *Corey* v. *City of Dallas*, 352 F. Supp. 977 (N.D. Tex 1972). The ordinance upheld in *Kisley* v. *Falls Church*, *supra*, was subsequently declared invalid by the federal district court for the Eastern District of Virginia in *Joseph* v. *House*, *supra*. The legislative scheme in *Maki* was overruled by the California Supreme Court in *Lancaster* v. *Municipal Court for Beverly Hills*, J.D. 100 Cal. Rptr. 609, 494 P.2d 681 (Cal. Sup. Ct. 1972).

[12] That Clause has been incorporated into the Fifth Amendment for District of Columbia purposes. *Bolling* v. *Sharpe*, 32 U.S. 497 (1954); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Schneider* v. *Rusk*, 377 U.S. 163 (1964).

in which it is embodied will be sustained only if the distinctions made are necessary to promote a compelling state interest. *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Kramer* v. *Union Free School District*, *supra*; *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Oyama* v. *California*, 332 U.S 633 (1948); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). On the other hand, if the classification does not affect a fundamental right or create a suspect class, it is sustained as valid if it has some rational relationship to a legitimate governmental interest or purpose. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Richardson* v *Belcher*, 404 U.S. 78 (1971); *Dandridge* v. *Williams*, 397 U.S. 471 (1971); *Flemming* v. *Nestor*, 363 U.S 603 (1960).

V

In the instant case we are confronted with a statute which was enacted in 1932 as part of a general licensing and revenue measure. There is nothing whatever in the legislative history of this law which characterizes it as anything but a measure to raise revenue to provide for, among other things, the cost of regulating various licensed businesses in the District of Columbia. See Sen. Rept. No. 867, 72d Cong., 1st Sess., to accompany H.R. 11638; H.Rept. No 1385, 72d Cong., 1st Sess. (1932). Specifically, there is nothing in the legislative history, whether by words or implication, to suggest the slightest congressional purpose to employ this enactment as a tool to enhance public morality or to curb immorality.

As will be discussed at pp. 22-25, *infra*, significant interests and possibly fundamental rights of the plaintiff are adversely affected by this statute.[13] It is obvious that a

[13] In addition to the interests discussed below, there is also the right to conduct a business free from governmental interference. This right has been termed basic, and it may be invaded only upon

mere purpose to raise revenue cannot overcome these interests and rights (see *Speiser* v. *Randall*, 351 U.S. 513 (1958)), particularly since the revenue-raising objective could be achieved without the prohibition on massages on persons of the opposite sex. If Congress is to be taken at its expressed word--that revenue is what it had in mind—its objective could be achieved without injury to protected interests by permitting the license fee provision in section 2311[14] to stand and by striking down those portions of the law which regulate and impair the rights and interests of those engaged in the massage parlor business or employed therein.[15]

The Corporation Counsel argues that, although Congress never indicated that section 2311 was anything but a revenue measure, the Court should assume that the regulation of public morality was the purpose of the legislation.[16]

Generally, the courts will not look behind statutory enactments to ascertain a hidden motive or design. How-

a showing that the governmental interest is superior to the rights of the persons adversely affected by the legislation. *New State Ice Co.* v. *Liebman*, 285 U.S. 262 (1932); *Truax* v. *Raich*, 239 U.S. 33 (1915). With respect specifically to the business of operating a massage parlor, see *Corey* v. *City of Dallas*, *supra*.

[14] "Owners or managers of massage establishments and turkish, Russian or medicated baths shall pay a license fee of $5.00 per annum."

[15] The status of the masseuses working in Geisha House is not wholly clear. According to the stipulated testimony, they are employees for some purposes and independent contractors for others.

[16] The Corporation Counsel may be relying upon language in the Senate Committee Report (Sen. Rept. No. 867, *supra*, at 3), which states that ". . .in a few instances the license is required for regulatory purposes. In other cases, the tax is fixed as compensation for the use of public space. But for the most part, the license taxes imposed are based solely upon the cost of the required inspections." This might be said to imply a regulatory purpose even as to section 2311.

ever, the Court has, of course, a duty to seek to sustain the constitutionality of legislation if it is possible to do so. See *United States* v. *Vuitch*, 402 U.S. 62 (1971); *Fleming* v. *Nestor, supra; United States* v. *Harriss*, 347 U.S. 612 (1954); *United States* v. *C.I.O.*, 335 US. 106 (1948). Moreover, in the present case, it is simply impossible to justify or even to explain the statutory classification on purely revenue-raising or licensing grounds. That being the case, it is in my opinion within the Court's prerogative and its duty to ascribe to the legislature the most reasonable and logical purpose that can be deduced from the language of the statute.

For these reasons, it will be assumed, for the purpose of the discussion which follows, (1) that such an undisclosed congressional motive or purpose does exist, and (2) that the prohibition on massages on persons of the opposite sex in section 2311 was designed primarily to regulate or to prohibit immoral behavior.

VI

An assumption that the law was designed to curb immoral activity would ascribe to the statute a constitutionally permissible purpose. It is well settled that a State, or in the case of the District of Columbia, the Congress acting as a state legislature, has the power to enact laws which regulate, proscribe, or punish certain immoral behavior. See *California* v. *LaRue*, 409 U.S. 109 (1972); *Berman* v. *Parker*, 348 U.S. 26 (1954); *Corey* v. *City of Dallas, supra;* 17 A.L.R. 2d 1183.

That being so, the next question becomes whether the statutory classification is relevant to the statutory purpose. To put it another way, is the classification reasonable in light of its purpose?

In the instant case, the classification is based solely on sex. Until fairly recently it had been taken as established that sex constitutes a valid basis for classification for most

purposes.[17] However, in recent years, the courts have begun to move from a posture of upholding classifications based on sex if nothing more was shown than a rational relation to a legitimate governmental interest, to regarding such classifications as suspect and hence sustainable only if a compelling state interest could be demonstrated.

In *Reed* v. *Reed*, 404 U.S. 71 (1971), the Court considered and struck down as unconstitutional an Idaho law which gave preference to males among the various classes of persons eligible to administer a decedent's estate, in the face of a claim that the distinction was permissible in view of the State's objective to reduce the workload of the courts by eliminating consideration of females. Two years later, in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Court declared unconstitutional four laws which provided that wives of servicemen were automatically to be considered dependents for certain purposes while husbands of servicewomen received the benefits involved only if dependency could actually be proved. Mr. Justice Brennan, in an opinion in which Justices Douglas, White and Marshall joined, concluded that classification on the basis of sex was inherently suspect, just as classification on the basis of race, alienage, and national origin, and that accordingly

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[17] Most of the earlier cases did not employ an equal protection analysis but still upheld statutory classifications on other constitutional and social grounds. Among these cases are: *Bradwell* v. *Illinois*, 83 U.S. 130, (1872), upholding the exclusion of women from the legal profession; *Minor* v. *Happersett*, 88 U.S. 162 (1874), denying women the right to vote; *Muller* v. *Oregon*, 208 U.S. 412 (1908), sustaining employment legislation applicable only to women. One of the first cases to use the equal protection approach was *Goesaert* v. *Cleary*, 335 U.S. 464 (1948), upholding a state statute excluding women from bartending professions unless they were "the wife or daughter of the male owner"; see also *Hoyt* v. *Florida*, 368 U.S. 57 (1961), upholding a Florida statute which excluded women from jury service unless they voluntarily applied.

any such classification had to be subjected to strict judicial scrutiny. In reaching this decision, the four Justices relied upon the earlier *Reed* decision. Also relying upon *Reed*, but for the conclusion that it did not designate classification based on sex as inherently suspect, were Justices Powell and Blackmun and the Chief Justice. Justice Stewart concurred in the result, relying upon the proposition not appear to be a conclusive Supreme Court determination of the constitutional status of classifications based on that the statutes before the Court worked an "invidious discrimination in violation of the Constitution" (411 U.S. at 691). Justice Rehnquist dissented.

In view of these differing views in *Frontiero*, there does not appear to be a conclusive Supreme Court determination of the constitutional status of classifications based on sex.[18] There is likewise no binding case law in the District of Columbia, at least not since *Frontiero*. Thus, this Court would appear to be as free as the various federal district courts—which are widely split on the issue[19]—to make its own judgment as to the current state of law in this area.

In my view, the basis for any judgment in this area must be the proposition in Mr. Justice Brennan's plurality opin-

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[18] The issue has not been clarified either by *Kahn* v. *Shevin*, 94 S.Ct. 1734 (1974) the most recent Supreme Court case in this field (which was apparently decided on considerations of tax policy).

[19] Some of these courts have applied the "rational relationship to a legitimate state objective" test (*Edwards* v. *Schlesinger*, Civil Action 1825-73 (D.C.D.C. 1974); *White* v. *Flemming*, 374 F.Supp. 267 (E.D. Wis. 1974)), *United States* v. *Offord*, 373 F.Supp. 1117 (E.D. Wis. 1974)), while others have followed Justice Brennan's strict judicial scrutiny standard (*Ballard* v. *Laird*, 360 F. Supp. 643 (S.D. Cal. 1973); *Wiesenfelder* v. *Secretary*, 367 F.Supp. 981 (D.N.J. 1973); *Andrews* v. *Drew Municipal Separate School System*, 6 E.P.D. ¶ 8727 (N.D. Miss. 1973); *State* v. *Chambers*, 307 A. 2d 78 (N.J. 1973)).

ion in *Frontiero, supra* (411 U.S. at 686) that "since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the member of a particular sex because of their sex would seem to violate the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ."

The genius of our system of government is its ability to adapt, however slowly, to changing societal values and mores. A large part of the reason why our legislatures and courts are shedding most of their earlier notions of women's role in society is that these notions do not any longer conform to today's realities. There is no sweeping generalization that can be involved to describe the role of women in society any more than men as a group can be categorized. In each case we are dealing with whole populations of fairly diverse persons. *Reed* and *Frontiero* simply represent recognitions of this fact, and of the inevitable consequence that sex-based classifications, because of their inherent irrationality, must be regarded as suspect.

It is also of significance that the Congress, by way of the Civil Rights Act of 1964, has laid down a broad national policy against discrimination in employment on account of sex. To be sure, that statute does not in terms apply to this plaintiff because Geisha House, Inc. does not now employ as many as fifteen persons (42 U.S.C. § 2000(e)(b). Nevertheless, the national policy represented by Title VII of that Act (42 U.S.C. § 2000(e) et seq.) is evidence of a congressional purpose to establish freedom from discrimination in employment on account of sex as a fundamental right of citizenship. Cf. *Joseph* v. *House, supra; Weeks* v. *So. Bell Tel. and Tel. Co.*, 408 F.2d 228 (5th Cir. 1969); *Bowie* v. *Colgate*, 416 F.2d 711 (7th Cir. 1969). While congressional policy does not necessarily establish a right as basic in the constitutional sense, it does constitute persuasive evidence of fundamental values in an area where

the question of what is and what is not basic and thus protected necessarily shifts with the changing values of successive generations. Cf. *Frontiero* v. *Rochardson, supra* (411 U.S. at 687); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

For these reasons, this Court concludes that freedom from discrimination on account of sex[20] constitutes a fundamental right and that classifications based on sex are inherently suspect. Judged by that standard, and in the absence of any compelling governmental interest, the classification effected by section 2311 is clearly invalid.

VII

In any event, it is clear that, even if a suspect class is not created by section 2311, the statute is invalid for, on two separate grounds, it must be held not to bear a rational relationship to a legitimate governmental purpose and therefore to violate the Equal Protection Clause.

The statute makes it unlawful for a person to administer massage treatment to a person of the opposite sex "in any establishment licensed under this section." Curiously, the law does not extend the same prohibition to massages administered in places not licensed under section 2311 or indeed to anyone else involved with massages in the District of Columbia. Even more curiously, as the Corporation Counsel candidly admitted, individuals need not be licensed

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[20] It has been suggested that no discrimination on account of sex is involved at all because, while women are forbidden to perform massages on men, men are equally forbidden to perform massages on women. As several courts have noted (*J.S.K. Enterprises* v. *City of Lacey, supra* at 605; Cf. *Ex parte Mak, supra* at 67) that line of reasoning does not differ significantly from the rationale used to justify the separate-but-equal doctrine of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). At least in justification for differentiation between the sexes, unless such differentiation is compellingly necessary. See *Loving* v. *Virginia*, 338 U.S. 1, 8 (1967).

under section 2311 even if they administer massages, and even if the person performing the massage and the one receiving the treatment are of the opposite sex. An opinion rendered by Judge Richmond Keech, when he was Corporation Counsel, declared that section 2311

> . . . applies only to massage establishments and not to itinerant masseurs. It is therefore the opinion of this office that a masseur or masseuse who does not operate a massage establishment does not need a license under this Act and that the restrictions placed upon massaging those of the opposite sex under this Act apply only to establishments licenses thereunder (Opinion of Richmond B. Keech, Corporation Counsel, to the Commissioners, dated August 15, 1941).

Following the rationale of the opinion of the Corporation Counsel, the District, in its Memorandum in Opposition to Motion for a Preliminary Injunction in this case, conceded that (p.6), "it is not illegal for a member of one sex to massage a member of the opposite sex except in businesses licensed under Section 47-2311. . . . [and] it is not unlawful for a corpo ation to be incorporated under the laws of the District of Columbia to give bisexual massages. . . ."

Thus, we are here faced with the anomaly that a person who performs a massage on an individual of the opposite sex in an establishment licensed under section 2311 is thereby automatically held to have committed a criminal offense, while the same person performing the same massage on the same individual outside of an establishment so licensed is regarded as violating no law. If there is a rational basis for this distinction, it is not apparent from the legislative history of the statute nor has it been pointed out by the Corporation Counsel. If section 2311 is designed to curb immorality—as the District argues—it defeats its own purpose by permitting performance of the

identical conduct anywhere and everywhere in the District of Columbia except in establishments licensed under section 2311. That kind of distinction illuminates the underinclusive character of the statutory prohibition (Cf. *Rinaldi* v. *Yeager*, 384 U.S. 305, 308 (1966); *Carrington* v. *Rash*, 380 U.S. 89, 95 (1965)) and is utterly irrational.

In *Cheek* v. *City of Charlotte*, 160 S.E. 2d 18 (N.C. 1968), the Supreme Court of North Carolina was confronted with an ordinance which prohibited the massage of persons of the opposite sex, but exempted, among establishments, hospitals, doctor's offices, barber shops, the YMCA, and the YWCA. Striking down this ordinance, the Court stated in language directly apposite here (160 S.E. 2d at 23):

> Applying . . . fundamental rules of constitutional law . . . it is clear that the ordinance in suit cannot withstand plaintiff's attack. There is no reasonable ground for putting [the exempted establishments] in a separate classification from massage parlors, health salons, or physical culture studios. . . .
>
> Obviously, the city council felt that the activities which the ordinance seeks to eliminate were not then being carried on in the exempted establishments. Notwithstanding, as presently written, the ordinance prohibits the proprietors and employees of a massage parlor from doing acts which can be done with impunity under similar circumstances in . . . the other exempted places of business Such favoritism cannot be sustained

The District of Columbia statute differs from the North Carolina ordinance only in that there the exemptions were spelled out in so many words while our statute provides for exemptions by omission from the prohibition. That is a distinction without a difference. Indeed, by narrowly defining the prohibited class and by leaving wholly untouched, undefined, or unregulated all others similarly

situated but for the fact that they lack a license, the District of Columbia law is, if anything, even more obnoxious to equal protection principles.

VIII

Section 2311 is lacking a rational basis related to a legitimate governmental purpose for yet another reason.

Certainly, as already noted, the curbing of immorality is a valid governmental objective. See p. 21, *supra*. But the problem with this law is that it punishes not actual acts of immorality but the mere possibility that such acts may be committed in the future.

In *District of Columbia* v. *Ricks*, (Gen. Sess. 1966, Greene, J.) this Court was confronted with the constitutional validity of D.C. Code § 22-2302, the District's vagrancy statute. It was there argued by the government on behalf of constitutionality that it was reasonable to presume that those in the categories described in the vagrancy law would be more likely than others to commit offenses, and that it was therefore a reasonable exercise of legislative power to provide for their arrest and punishment when they were in a position of opportunity to carry out this presumed intention (slip opinion, pp. 8-9).[21] This Court held that this approach in effect amounted to a form of preventive conviction imposed upon those who, although they had committed no overt criminal act, appeared to be more likely than the general public to commit certain crimes, and it rejected the concept with these words (slip opinion, p. 8)

> . . . I do not believe that our constitutional system—with its requirements of due process, presumption of

[21] The basic theory on which the government proceeded in that case was that, as the prosecutor testified, "you certainly don't have to wait until a person goes in and engages in the act of prostitution before you can see fit to arrest that person for being a vagrant;" in the prosecution's views it was enough if there was probable cause to believe that the person would commit a crime (slip opinion, p. 3).

> innocence, and proof beyond a reasonable doubt—is so elastic as to countenance convictions based on suspicion. Yet, when examined in the light of the cold realities and the logic of its only meaningful application, that is what the vagrancy statute is—a law for convictions based not on proof of criminal acts but on the belief, reasonable or otherwise, that these might be committed.

In my view, this reasoning, which was in essence sustained by the U.S. Court of Appeals,[22] applies equally to the statute under consideration here, and serves to invalidate that statute on equal protection grounds.[23] As the Court of Appeals of the State of Washington said in *J.S.K. Enterprises, supra* (492 P.2d at 607),

> Massage is one of the oldest forms of therapy. When properly administered in an appropriate case, it can be one of the most useful forms of therapy. To deny all massagists the right to practice their profession upon both sexes because some individuals utilize a sauna massage parlor as a subterfuge to perform lewd acts for compensation would require stereotyping of the worst kind. It is saying, in effect, that because some women perform lewd acts in sauna parlors that all massagists can be judged to be lewd if given the opportunity and therefore they cannot massage members of the opposite sex. Not only is this discrimination as

[22] The U.S. Court of Appeals declared the District's vagrancy statute unconstitutional, largely on grounds of vagueness; but it also sustained the theory of this Court (*Ricks* v. *District of Columbia*, 134 U.S. App. D.C. 201, 214, 414 F.2d 1097 (1968)). The U.S. Supreme Court affirmed the unconstitutionality of vagrancy laws in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1970).

[23] That invalidity may also be expressed as being predicated on overbreadth under the Due Process Clause. See *Cianciolo* v. *City of Knoxville, supra*.

> to both sexes of massagists but it would deny the people who need their services the opportunity to select the best qualified massagist available to them.

Similarly, the Court said in *Cianciolo* v. *City of Knoxville, supra* at 9, "the ordinance under consideration . . . seeks to protect the community's sense of propriety, yet the ordinance's weakness is . . . [that] it fails to recognize that not all female masseuses will abuse a historically legitimate occupation when permitted to massage clients of the opposite sex, nor will male masseurs commit lewd acts when they massage patrons of the opposite sex."

Here, the District has ample means with which to deal with prostitution and other forms of sexual misconduct. Soliciting for the purpose of prostitution is an offence under D.C. Code § 22-2701; inducing a female to become a prostitute is an offense under D.C. Code § 22-2705; procuring is an offense under D.C. Code §§ 22-2707, 2710, 2711; operating a house of prostitution is an offense under D.C. Code § 22-2712; keeping a disorderly house is an offense under D.C. Code § 22-2722. D.C. Code § 22-2713 provides an additional and potent safeguard by declaring premises occupied for lewdness, assignation, or prostitution to be a nuisance and subject to forfeiture.

If these criminal and civil penalties are not sufficient to guarantee that the establishment operated by this plaintiff will be maintained and operated in a manner so as not to offend public morals, the Congress and the City Council have it within their power to enact other legislation which will further safeguard that those persons operating massage parlors and those employed therein will not engage in activities inimical to the public interest. For example, these legislative bodies might exclude from operation and employment persons with certain types of criminal records; require the licensing of individual masseuses; regu-

late the manner of giving massages; regulate the dress of customers; prohibit massages in particular areas of the establishment; regulate the hours of operation; and provide for periodic inspection.[24]

This Court, no more than the District government or the Metropolitan Police Department, has any way of knowing whether the activities engaged in on the premises of Geisha House will be harmless or immoral, helpful to the physical and emotional well-being of its patrons or a cover for activities otherwise forbidden by law. There has been no proof one way or the other. The fundamental question, then, is whether the government may proceed to convict citizens and close the doors of business establishments on the mere suspicion that they might engage in activities inimical to public morality. In my judgment, government, with its vast powers, must leave people alone, unless it has evidence that they actually committed acts that may validly be prohibited in the exercise of legitimate governmental authority. But it may not, consistently with the Constitution, intervene in private activities upon the supposition that the participants, somehow, some time, might engage in criminal conduct.

The statute under consideration here, and the acts of these defendants, do not measure up under that standard. If the District finds that immoral and illegal activities are actually occurring on the premises of this plaintiff, it has an arsenal of weapons at its disposal with which to combat and suppress them, from a wide range of criminal laws (which would subject any participant in such activities to penalties of imprisonment) to a forfeiture of the very

[24] The District of Columbia presently requires that all applicants for licenses for massage establishments have fingerprints taken in accordance with Police Regulation Article 34, section 1. Applicants are also required to submit a Police Department 70 form, which is a record of arrest provided by the Central Records Division of the Metropolitan Police Department.

premises of this plaintiff. But speculation and conjecture will not suffice.

D.C. Code § 47-2311 is hereby declared unconstitutional, and defendants are permanently enjoined from enforcing that statute.[25]

HAROLD H. GREENE
Chief Judge

September 25, 1974

[25] The following provisions of section 2311, which are not affected by the foregoing analysis and do not violate the Equal Protection Clause, continue to be valid in accordance with D.C. Code 47-2349:

> Owners or managers of massage establishments and Turkish, Russian, or medicated baths shall pay a license fee of $5 per annum. No license shall be issued under this section without the approval of the major and superintendent of police . . . . Any person violating the provisions of this section shall, upon conviction, be punished as hereinafter provided in this chapter; and, in addition to such penalty, it shall be the duty of the Commissioner of the District of Columbia to revoke the license of the owner or manager of the establishment wherein the provisions of this section shall have been violated.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 9020

MAURICE J. CULLINANE, ET AL., *Appellants*,

v.

GEISHA HOUSE, INC., *Appellee*.

Appeal from the Superior Court of the
District of Columbia

(Argued October 16, 1975 Decided March 22, 1976)

(Judgment entered March 22, 1976)

David P. Sutton, Assistant Corporation Counsel, with whom *C. Francis Murphy*, Corporation Counsel at the time the brief was filed, *Louis P. Robbins*, Acting Corporation Counsel, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for appellants.

Glenn R. Graves for appellee.

Before KELLY, GALLAGHER and NEBEKER, Associate Judges.

GALLAGHER, *Associate Judge:* This was an action for declaratory judgment and injunctive relief against the Chief of Police and his subordinate. The plaintiff-appellee, Geisha House, is the operator of a massage establishment (commonly referred to as a "massage parlor"),[1] which is licensed under D.C. Code 1973, § 47-2311. In pertinent part this section reads as follows:

> . . . It shall be unlawful for any female to give or administer massage treatment or any bath to any person

[1] Various prices are listed for Geisha House, *e.g.*, "Basic Massage"—$25.00; "Bikini Massage"—$30.00; "Negligee Massage"—$30.00; "Use of Photography Studio"—$10.00. Exhibit 1(B) to appellants' motion for reconsideration submitted to the trial court.

> of the male sex, or for any person of the male sex to give or administer massage treatment or any bath to any person of the female sex, in any establishment licensed under this section. Any person violating the provisions of this section shall, upon conviction, be punished as hereinafter provided in this chapter; and, in addition to such penalty, it shall be the duty of the Commissioner of the District of Columbia to revoke the license of the owner or manager of the establishment wherein the provisions of this section shall have been violated.[2]

Arrests had been made previously of three female employees of Geisha House for violations of that code provision.[3] The trial court permanently enjoined enforcement of the statutory provision involved as being violative of the rights to due process and equal protection of the law.[4] There are five issues proposed on appeal:[5]

(1) Whether this case is controlled by certain dismissals by the Supreme Court of state court appeals for want of a substantial federal question.

[2] Punishment is imprisonment for not more than 90 days or a fine of not more than $300. D.C. Code 1973, § 47-2347.

[3] There is involved here a criminal statute not a zoning law or an administrative regulatory statute. As to zoning and administrative regulation, there could scarcely be any serious question about the validity of a reasonable use of those legislative avenues in relation to the community problem with "massage parlors."

[4] The equal protection concept is incorporated into the Fifth Amendment where the District of Columbia is concerned. *Bolling* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

[5] The trial court also decided that it has the jurisdiction to declare Acts of Congress of purely local application unconstitutional and the power to enjoin their enforcement. This holding is not questioned on appeal.

(2) Whether the statute infringes on the fundamental constitutional right to pursue a legitimate occupation, and such infringement is not warranted by a sufficient governmental interest.

(3) Does the statute create a gender-based distinction (between masseurs and masseuses) which is constitutionally "suspect" and not justified by any compelling governmental interest.

(4) Is the statute an impermissible "prophylaxis" which creates an irrebuttable presumption that cross-sexual massage on licensed premises will lead to criminal activity.

(5) Does the statute discriminate invidiously as it proscribes cross-sexual massage in licensed establishments but not elsewhere in the city, *e.g.*, itinerant masseurs and masseuses plying their trade in hotels.

These questions have been disposed of in appellants' favor by recent Supreme Court action.

Preliminarily, it is necessary to recognize it is the law that a dismissal of an appeal by the Supreme Court for want of a substantial federal question is an adjudication on the merits of the questions there presented. *Hicks* v. *Miranda*, — U.S. —, 95 S.Ct. 2281, — L.Ed.2d — (1975). Consequently, this leaves for us a comparison of the issues presented here with issues recently necessarily decided as a matter of law by the Supreme Court because of dismissals for want of substantial federal questions. If the issues here were for all practical purposes previously presented to the Supreme Court in those cases and consequently disposed of there, this would leave little for us in deciding this case.

In several cases where the Supreme Court has dismissed for want of a substantial federal question the jurisdictional statements presented to the Court contained between them all the issues we have here; *see, e.g., Smith* v. *Keator*, 419

U.S. 1043, 95 S.Ct. 613, 42 L. Ed. 2d 636 (1974) [6] (Exhibit A to appellants' motion for summary reversal in the instant case), *Rubenstein* v. *Cherry Hill*, 417 U.S. 963, 94 S.Ct. 3165, 41 L. Ed. 2d 1136 (1974) [7] (Exhibit C to appellants' motion for summary reversal in the instant case), and *Kisley* v. *City of Falls Church*, 409 U.S. 907, 93 S.Ct. 237, 34 L. Ed. 2d 169 (1972).[8]

Moreover, in *Colorado Springs Amusements, Ltd.* v. *Rizzo*, 524 F.2d 571 (3d Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3428 (U.S. Jan. 14, 1976) (No. 75-999), the court was confronted with a section of the Philadelphia code [9] which provides to the same effect as the statute we have under consideration. Upon the basis of the Supreme Court's dismissals for want of a substantial federal question in *Smith* v. *Keator*, *supra*, *Rubenstein* v. *Cherry Hill*, *supra*, and *Kisley* v. *City of Falls Church*, *supra*, the court reversed the trial court's holding that the statute was unconstitutional. In *Hogge* v. *Johnson*, 44 U.S.L.W. 2121, — F.2d — (4th Cir. 1975), *petition for cert. filed*, 44 U.S. L.W. 3431 (U.S. Dec. 31, 1975) (No. 75-927), that circuit court followed the very same course when confronted with a similar statute pertaining to "massage parlors." [10]

Since the issues here presented are the same, the Supreme Court's actions in dismissing for want of a substan-

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[6] 285 N.C. 530, 206 S.E.2d 203 (1974).

[7] No. M-236, *unreported*, N.J. (Jan. 29, 1974).

[8] 212 Va. 693, 187 S.E.2d 168 (1972).

[9] Section 9-610(4), which provides:

> *Prohibited Conduct.* No person employed or engaged in the business of a masseur or masseuse shall treat a person of the opposite sex.

[10] While it is not pressed, appellee also contends that the statute conflicts with Title 7 of the Civil Rights Act 42 U.S.C. 2000 e-2(a)(1) & (2) and 2000 e-7. This contention was also made in *Rubenstein* v. *Cherry Hill*, *supra*, and the Supreme Court in that case dismissed for want of a substantial federal question.

tial federal question are, of course, equally binding upon us. This disposes of the questions presented on the merits and requires a reversal of the judgment entered in the trial court.[11]

Reversed and remanded with instructions to dismiss the complaint.[12]

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[11] We might comment, in passing, that, contrary to the position of appellee, the Supreme Court has not yet held that classificatior based upon sex is inherently suspect in every circumstance. *See, e.g., Stanton* v. *Stanton*, 421 U.S. 7, 95 S.Ct. 1373 — L. Ed. 2d — (1975).

[12] If the issues raised by Geisha House were open to us for consideration in assessing constitutionally the reasonableness of the exercise of police power in enacting this statute dealing with cross-sexual massage parlors, we would deem it appropriate to bear in mind the oft repeated observation that an appellate court "need not be blind to what all others know." *Burr* v. *NLRB*, 321 F.2d 612, 624 (5th Cir. 1963).

BRIEF FOR RESPONDENTS IN OPPOSITION

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1482

GEISHA HOUSE, INC.,
Petitioner,
v.
MAURICE J. CULLINANE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Whether the District of Columbia Court of Appeals correctly concluded, on the basis of decisions of this Court, that petitioner's constitutional challenges to D.C. Code, 1973, § 47-2311, which prohibits a person from administering a bath or massage to a member of the opposite sex in a licensed massage establishment, are totally insubstantial.

STATUTE INVOLVED

D.C. Code, 1973 Edition:

> "§ 47-2311. *Massage establishments—Turkish, Russian, or medicated baths.*
>
> "* * * It shall be unlawful for any female to give or administer massage treatment or any bath to any person of the male sex, or for any person of the male sex to give or administer massage treatment or any bath to any person of the female sex, in any establishment licensed under this section. Any person violating the provisions of this section shall, upon conviction, be punished as hereinafter provided in this chapter * * *."

COUNTER-STATEMENT OF THE CASE

Petitioner is a corporation licensed to engage in business as a massage establishment in the District of Columbia. Respondents are the Metropolitan Police Chief and an inspector in charge of the Metropolitan Police Department's Morals Division.

In an action for declaratory and injunctive relief filed in the District of Columbia Superior Court, petitioner challenged the constitutionality of D.C. Code, 1973, § 47-2311, which makes it unlawful for a person to administer a massage or bath to a person of the opposite sex in any licensed massage establishment in the District of Columbia (Pet. App. 1a-2a, 28a-29a). Following the entry by the Superior Court of an order granting petitioner's motion for a preliminary injunction (Pet. App. 2a), the case came on before the court on petitioner's request for permanent injunctive relief. Following a hearing, the court declared § 47-2311 unconstitutional and permanently enjoined respondents from enforcing it (Pet. App. 2a, 27a). The court filed an opinion in support of its ruling (Pet. App. 1a-27a). The District of Columbia Court of Appeals reversed (Pet. App. 28a-32a), and this petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

In reversing the judgment of the District of Columbia Superior Court, the District of Columbia Court of Appeals concluded that petitioner's constitutional challenges to D.C. Code, 1973, § 47-2311, were insubstantial. In taking such an approach, the Court relied on recent decisions of this Court summarily disposing of appeals in cases in which similar constitutional challenges had been advanced. *Kisley* v. *City of Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972), appeal dismissed for want of substantial federal question, 409 U.S. 907 (1972); *Rubenstein* v. *Township of Cherryhill*, No. M-236 (N.J., 1974), appeal dismissed for want of substantial federal question, 417 U.S. 963 (1974); *Smith* v. *Keator*, 285 N.C. 530, 206 S.E.2d 203 (1974), appeal dismissed for want of substantial federal question, 419 U.S. 1043 (1974).

As recently as last term, this Court held that a summary disposition by it of an appeal, whether by affirmance or dismissal for want of a substantial federal question, is a decision on the merits and, as such, binding on lower courts to the extent that similar questions are presented. *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975). Although petitioner suggests that this Court should exercise its certiorari jurisdiction in order to reexamine such a holding, petitioner advances no logical reason why this Court should do so. In questioning the significance of this Court's pronouncements in *Hicks* as to the effect of its summary disposition of an appeal, petitioner (petition at 11) essentially relies on authorities which antedated that decision. And although there was a dissenting opinion in *Hicks*, not one member of this Court took issue with that part of the majority opinion which addressed the meaning of a dismissal for want of a substantial federal question. Cf. *Colorado Springs Amusements, Ltd.* v. *Rizzo*, 524 F.2d 571, 575, n. 8 (3rd Cir., 1975).

Petitioner cites no recent doctrinal developments which would support the thesis that any of the constitutional issues tendered to this Court in *Kisley*, *Rubenstein* and *Smith*, and similarly tendered to the District of Columbia Court of Appeals in this case, have suddenly become so substantial as to warrant this Court's plenary consideration. Cf. *Colorado Springs Amusements, Ltd.* v. *Rizzo*, *supra*, 524 F.2d at 576-577; *Hogge* v. *Johnson*, 526 F.2d 833 at 835 (4th Cir., 1975). However, in an attempt to avoid the impact of this Court's summary disposition pattern in appeals involving similar constitutional challenges by operators of massage parlors, petitioner asserts (petition at 8) that the statute in this case has a unique feature which distinguishes it from those involved in the decisions of this Court upon which the District of Columbia Court of Appeals relied. In that regard, petitioner points to the absence in its antecedent legislative history of both documentation of a congressional response to mischief in the form of illicit conduct in massage parlors and a legislative purpose designed to promote the public interests of order and morality. It is clear, however, that petitioner has misconceived the applicable legal standards enunciated by this Court. As this Court made plain in *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), when, as here, fundamental rights and suspect classifications are not involved, the statute must be upheld if "'* * * any state of facts reasonably may be conceived to justify it' * * *." Under the rational relationship test, "courts have attributed to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification." See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 at 1078 (1969). And it is "constitutionally irrelevant whether * * * [the] reasoning [sustaining the statute] in fact underlay the legislative decision * * *." *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960). Therefore, as the Superior Court in effect recognized (Pet. App. 16a), all reasonable legislative purposes should be

explored in passing on the validity of the provision involved. Applying these principles here, it requires little imagination to discern from the face of § 47-2311, D.C. Code, 1973, that it is designed to curtail opportunities for licentiousness and promiscuity that would otherwise exist in the intimacy of the treatment room of a massage parlor (cf. Pet. App. 28a, n. 1). As such, it obviously promotes the public interests of order and morality. Since that is a valid legislative purpose, and one which underpinned the similar enactments recently upheld by this Court under the raional relationship test, petitioner's contention that the local statute is *sui generis*, for purposes of judicial scrutiny under the equal protection doctrine, is plainly insufficient to warrant the exercise of this Court's certiorari jurisdiction.

Petitioner additionally contends that this case presents an issue not tendered to this Court in appeals from decisions upholding the constitutionality of other enactments prohibiting the practice of cross-sexual massage, i.e., whether § 47-2311 results in a denial of equal protection of the law because of its failure to regulate such a practice in places other than in licensed establishments (petition at 9).[1] In *Kisley* v. *City of Falls Church*, *supra*, however, the petitioner claimed (Jurisdictional Statement at 7) that the ordinance involved resulted in a denial of equal protection because it distinguished between massage as performed in its establishment and massage as performed in barber shops and beauty parlors. In responding to that contention (Motion to Dismiss or Affirm at 4-5), the City urged that there was a rational basis

[1] Petitioner in effect concedes that the various other constitutional issues passed on by the District of Columbia Court of Appeals (Pet. App. 30a) were also presented in appeals summarily disposed of by this Court on prior occasions, for petitioner makes no contention to the contrary. In any event, such a contention would be baseless. See *Colorado Springs Amusements, Ltd.* v. *Rizzo*, *supra*, 524 F.2d at 576.

for such a distinction because of the advertising techniques utilized and the types of services performed in establishments such as that involved. (See also 187 S.E.2d at 170.) Advertising material which depicts the distinct nature of the services performed in petitioner's establishment is contained in the record in this case and was specifically noted (Pet. App. 28a at n. 1) by the District of Columbia Court of Appeals. In any event, the insubstantiality of the contention that § 47-2311 unconstitutionally discriminates against the practice of massage as performed in licensed establishments because of its failure to address the practice as performed elsewhere is readily apparent from an unbroken line of this Court's decisions which hold that in approaching a problem, a legislative body may confine its prohibition to cases in which the regulatory need appears to be clearest and does not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See *Heath & Milligan Co.* v. *Worst*, 207 U.S. 338, 354-355 (1907); *Central Lumber Co.* v. *South Dakota*, 226 U.S. 157, 160-161 (1912); *Keokee Coke Co.* v. *Taylor*, 234 U.S. 224, 227 (1914); *West Coast Hotel* v. *Parrish*, 300 U.S. 379, 400 (1937); *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955); *McDonald* v. *Board of Election*, 394 U.S. 802, 809 (1969); *Geduldig* v. *Aiello*, 417 U.S. 484, 495 (1974). "[There] is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency* v. *New York*, 336 U.S. 106, 110 (1949).

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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